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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 10

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE, PETITIONER

v.

LIEUTENANT GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals (R. 53-57) is reported at 184 F. 2d 404.

JURISDICTION

The judgment of the Court of Appeals was entered October 5, 1950 (R. 58). On December 28, 1950, the time to file a petition for a writ of certiorari was extended by Mr. Justice Minton to March 3, 1951 (R. 62). The petition was filed

on February 19, 1951, and was granted on April 9, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the exhaustion of military remedies was a prerequisite to habeas corpus where the petitioner attacked the jurisdiction of a court-martial on the basis of his alleged civilian status.

2. Whether an honorable discharge for the period for which petitioner had been drafted releases him from liability for desertion from a former enlistment which had not expired, which he did not reveal at the time he was drafted, and which was not known at the time of the discharge.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*, pp. 38-44.

STATEMENT

Petitioner enlisted in the United States Army in 1926 and was discharged in 1929. On or about March 12, 1930, he reenlisted for a term of three years but went absent without leave on or about July 2, 1930, and remained absent in desertion until August 1942, at which time he was apprehended. On or about October 13, 1942, he was restored to duty. Pursuant to the Extension of Service Period Act of December 13, 1941 (Appendix A, *infra*, p. 44), his term would have extended for the duration of the war plus six months. On or about

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March 15, 1943, he again went absent in desertion. (R. 7.)

He was inducted into the Army on March 16, 1944, but did not reveal his former enlistment and desertion (R. 7, 8). He was honorably discharged on June 29, 1946. The certificate of discharge stated that petitioner was "honorably discharged from the military service" and gave the "Date of Induction" as March 16, 1944, but the space for "Date of Enlistment" was left blank (R. 39).

In 1948, the Criminal Investigation Division of the Army, through its fingerprint department, discovered that petitioner was the person who had deserted in 1943 (R. 7, 15). In February 1949, after further investigation, petitioner was arrested. Thereafter he was tried by a general court-martial convened at the headquarters of the Fifth Army, Chicago, Illinois, and convicted of the 1943 desertion, under the 58th Article of War, Act of June 4, 1920, c. 227, 41 Stat. 800, 10 U.S.C. 1530. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and three years at hard labor. On December 7, 1949, the Commanding General, respondent Lieutenant General S. J. Chamberlin, approved the sentence but reduced the period of confinement to ten months and mitigated the dishonorable discharge to a bad conduct discharge. (R. 7.) As required by AW 50(e) (as amended June 24, 1948, c. 625, 62 Stat. 604, 635, 10 U.S.C., Supp. IV, 1521, Appendix A,

infra, pp. 40-42), General Chamberlin withheld the order directing the execution of the sentence pending appellate review as prescribed by that article.[1]

Six days later, on December 13, 1949, before any action had been taken by the Board of Review pursuant to AW 50(e), petitioner filed the petition for a writ of habeas corpus involved in this proceeding in which he claimed that he was a civilian not subject to the jurisdiction of the Army (R. 2-4). A writ was issued (R. 5) and a return was filed setting forth petitioner's military history as detailed above (pp. 2-4) and pointing out, *inter alia,* that his conviction had not been reviewed and acted upon by the Board of Review or the Judge Advocate General in accordance with prescribed military procedure (R. 6-9). A hearing was held in the district court on December 16, 1949, at which the only evidence introduced was a certified copy of petitioner's honorable discharge certificate dated June 29, 1946 (R. 39). After argument of counsel, the court on the same day entered an order discharging petitioner from respondents' custody and enlarging him upon his own recognizance in the sum of $100 pending appeal. (R. 41.)

On respondents' appeal, the court of appeals on October 5, 1950, held that the district court had

[1] The full text of General Chamberlin's order, taken from the official court-martial record, is copied in Appendix B, *infra,* pp. 45-47.

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no jurisdiction to hear petitioner's habeas corpus petition until the remedies under Articles of War 47, 50(e), and 53 had been exhausted.[2] It declined, therefore, to pass upon the merits of petitioner's contention that he was not subject to military jurisdiction. (R. 53-57; 184 F. 2d 404). The cause was accordingly remanded to the district court "with instructions to dismiss relator's petition for writ of habeas corpus, to discharge said writ and remand relator to the custody of respondents, such action, however, to be without prejudice to the right of relator to file a new application for a writ of habeas corpus following exhaustion of indicated administrative remedies under the Articles of War" (R. 57).

On October 30, 1950, after the decision below, the Board of Review completed its examination of the record of petitioner's trial and held it to be legally sufficient to support the finding of guilty and the sentence. Since neither the Board nor

[2] AW 47(c) (Appendix A, *infra*, pp. 39-40) requires review and approval of a conviction by a general court-martial by the convening authority, in this case, General Chamberlin. The court of appeals stated that petitioner filed his petition for a writ of habeas corpus before General Chamberlin acted on the conviction but that the action of General Chamberlin in approving and reducing the sentence was announced before the hearing in the district court. As we have seen, General Chamberlin's action was dated six days before the petition was filed. Article 50(e), however, required review by the Board of Review, and by other authorities in certain contingencies, and final approval before General Chamberlin could order the execution of the sentence. Article 53 (Appendix A, *infra*, pp. 43-44) provides a new remedy by way of a motion addressed to the Judge Advocate General for a new trial or other relief. See *Gusik* v. *Schilder*, 340 U.S. 128.

the Judge Advocate General deemed confirming action necessary, the Judge Advocate General on October 31, 1950, in accordance with the provisions of AW 50(e)(1), transmitted the Board's holding to General Chamberlin and advised him that he was authorized to order the execution of the sentence.[3] We are advised by the Office of the Judge Advocate General that General Chamberlin has taken no further action on the sentence pending final disposition of the instant proceeding. Under AW 51(a) (Appendix A, *infra*, p. 42) General Chamberlin has "the power to mitigate, remit, or suspend the whole or any part" of the sentence.

SUMMARY OF ARGUMENT

I

The petition for a writ of habeas corpus was filed before petitioner's conviction by court-martial had been reviewed by the Board of Review as required by AW 50(e). As of this date the military process of review is still not complete, for the commanding officer, who has power to mitigate the whole or any part of a sentence (AW 51(a)), has not yet acted to promulgate the sentence of the court-martial, and no motion for a new trial under AW 53 has been made.

The court below directed dismissal of the petition on the principle that resort to habeas corpus

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[3] The full texts of these actions, taken from the official court-martial record, are set forth in Appendix B, *infra*, pp. 45-47.

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is premature unless all the available processes prescribed in the Articles of War, including the remedy of a motion for new trial, have been exhausted. This Court shortly thereafter affirmed this principle in *Gusik* v. *Schilder,* 340 U.S. 128. The present case is one in which the military proceedings are further from completion than in the *Gusik* case; here the time to move for a new trial has not even been reached since the sentence of the court martial has not yet been ordered executed by the Commanding General.

We do not urge that the *Gusik* case holds that never, under any circumstances, will a federal court review a court-martial through habeas corpus except after the conclusion of the military procedures. This Court has held that the importance of the writ to constitutional freedoms precludes its being circumscribed by any rigid conditions. The question in each case must be whether the deprivation of liberty is so shocking, or the requirement that the petitioner go through the appellate procedures so unreasonable, that the federal courts are justified in exercising their discretion to intercede at an earlier stage. Such is not the situation in this case.

The military authorities did not act without apparent sanction of law. The legal question involved, and there is no factual question of substance, is whether the honorable discharge from the period of service from 1944 to 1946 serves to release the petitioner from liability for desertion committed in an earlier and undisclosed enlistment from which

he had never been formally discharged. This is clearly not a situation in which the Army picked up a civilian who owed no duty of submission to military discipline and proceeded to try and convict him.

Petitioner argues that his claim to be a civilian goes to the jurisdiction of the court-martial and therefore precludes the application of the rule of the *Gusik* case and permits resort to habeas corpus prior to completion of the military procedures. The decisions of this Court establish that habeas corpus is not available in the early stages of a proceeding merely because the petitioner attacks the jurisdiction of the court to try him or the basic authority under which he is held in custody. *Henry* v. *Henkel*, 235 U.S. 219; *United States* v. *Sing Tuck*, 194 U.S. 161.

The issue of the jurisdiction of the court-martial was squarely raised at the trial, was considered in the initial steps of the military review, and can be reconsidered on application for a new trial. There is therefore no need at the present time for intervention by the civil courts. In fact, if the petitioner's argument on the merits were sound, it should be presumed that the military authorities will apply the law correctly and will release the petitioner. The new trial procedure of AW 53 provides a real and effective remedy. It was intended by Congress and has in fact been administered to correct the mistakes and the injustices which have occurred in the regular proceedings. To grant habeas corpus

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at this juncture would be to substitute the writ for the regular appellate procedure.

II

Assuming that petitioner may at this time contest the jurisdiction of the court-martial by habeas corpus, the judgment of the court below should be sustained on the ground that petitioner is validly detained in the custody of the Army. Petitioner's honorable discharge covered no more than on its face it purported to cover, *i.e.*, petitioner's service from March 16, 1944 to June 29, 1946. It did not condone petitioner's desertion from his prior enlistment in 1943.

AW 107 (Appendix A, *infra*, pp. 38-39) provides that a deserter, before being discharged from his enlistment, is liable to serve, after his return to a full duty status, the balance of his enlistment remaining unserved at the time of his desertion. At the time petitioner deserted he would have had more than two years to serve under AW 107 irrespective of the Extension of Service Act. Under that Act his enlistment would not have expired until January 1948. The time lost could not be deemed made up by the 1944 to 1946 military service since enlistment by a soldier already subject to an existing enlistment "without having first received a regular discharge" is defined in AW 28 (Appendix A, *infra*, p. 38) as a desertion. AW 108 (Appendix A, *infra*, p. 39) prohibits a discharge before expiration of the term of service except by

order of certain officers or by sentence of a general court-martial. The combined effect of Articles 28, 107 and 108 accordingly prohibited the discharge of petitioner from the earlier enlistment from which he deserted in the absence of a special order.

The long-continued, consistent administrative interpretation supports the view that a discharge relates only to the period it purports to cover, and does not release a deserter from liability for desertion in a prior enlistment. Manual for Courts Martial 1928, p. 8; Winthrop, Dig. Op. JAG 1895, p. 360; Dig. Op. JAG 1912, p. 462; Dig. Op. JAG 1912-1940, p. 381. This long-established interpretation is entitled to great weight. *Hiatt* v. *Brown*, 339 U.S. 103, 109; *Hirshberg* v. *Cooke*, 336 U.S. 210, 216. Congress has adopted this interpretation of the effect of a discharge in Article 3(c) of the new Uniform Code of Military Justice (64 Stat. 109, 50 U.S.C., Supp. IV, 553 (c)).

The construction of an honorable discharge as relating only to the period of enlistment which it purports to cover accords with the practical realities confronting the Army after the termination of hostilities in World War II. The only effective method of discovering deserters is by means of fingerprints. With millions of persons involved, names mean little in the military services. Serial numbers are the prime means of identification. Where, as here, a deserter disclaims prior service at induction and receives a new serial number, prior desertion cannot readily be discovered. It

would seriously have delayed demobilization to have checked the fingerprints of all soldiers prior to their separation. To hold that petitioner's honorable discharge under one serial number released him from liability from a desertion in a prior enlistment which had not expired and which he did not reveal at the time of induction would thwart the clear intention of Congress that soldiers should not be permitted to evade their enlistment obligations. Petitioner's 1946 discharge for the period from 1944 to 1946 did not deprive the court-martial of jurisdiction to try him for his 1943 desertion.

ARGUMENT

I

The Resort to Habeas Corpus Is Premature, Since the Military Procedures Have Not Been Completed

In *Gusik* v. *Schilder,* 340 U.S. 128, this Court held that resort to habeas corpus by a person detained under sentence of a court-martial is premature if the petition is filed before all the available procedures prescribed in the Articles of War, including the remedy of a motion for a new trial under AW 53, have been exhausted. Admittedly, petitioner has not applied for a new trial under AW 53 in this case, although the time for doing so has not expired. Moreover, as of the time of his petition for habeas corpus, the review by the Board of Review under AW 50(e) (10 U.S.C., Supp. IV, 1521(e)) had not been completed. As of the present time, the Board of Review has examined the record

and found it sufficient (see p. 5, *supra*), but the Commanding General has not yet promulgated an order directing the execution of the sentence. The issuance of this order is not merely a ministerial act, for, under AW 51(a) (10 U.S.C., Supp. IV, 1523(a)), the Commanding General has "the power to mitigate, remit, or suspend the whole or any part" of the sentence. Thus General Chamberlin may suspend or remit entirely the sentence of imprisonment, thereby eliminating all basis for habeas corpus. Inasmuch as the military remedies had not been completed, the court below ordered that the petition be dismissed without prejudice to renewal upon completion of military processes (R. 57).

The *Gusik* decision does not, of course, expound a new doctrine (see, *e.g.*, *Mooney* v. *Holohan*, 294 U.S. 103; *Ex parte Hawk*, 321 U.S. 114); its particular significance in this case is that it applies a well-established policy to military procedures and to the specific remedy provided by AW 53.

It is recognized that the exhaustion of the review procedures provided by the authority which is depriving the prisoner of his liberty is not a jurisdictional prerequisite of habeas corpus, and that in appropriate cases the federal courts retain the discretion to grant the writ even where an appeal has not been taken. *Bowen* v. *Johnston*, 306 U.S. 19. The federal courts have adopted this self-imposed limitation on the grant of the writ in order to promote the orderly administration of justice by dis-

couraging the use of habeas corpus as a substitute for ordinary administrative and review procedures. Exceptions to the general rule occur where the federal courts are shocked by a deprivation of liberty without legal sanction so that the immediate freedom of the petitioner appears more important than permitting the erring courts to correct their own mistakes. The importance of the writ, not only historically but in its current application, is so great that this Court has refused to permit it to be confined by rigid requirements which would prevent a court from protecting a petitioner's liberty where the judicial conscience would be repulsed by his continued confinement. See *Sunal* v. *Large*, 332 U.S. 174, 178-180.

This case is not one in which an exception should be made to the general rule. Assuming, for the sake of the argument, that the petitioner can eventually establish on the merits that he is entitled to his freedom, nevertheless this case is still not an appropriate one for the grant of habeas corpus prior to the completion of the regular military procedures.

The petitioner relies principally on the argument that he was a civilian at the time of his arrest, trial, and conviction, and was therefore not subject to the authority of the particular court-martial or of any other court-martial. He bases his argument upon the honorable discharge which was given him in 1946, which, it is contended, relieved him entirely

from subjection to military law.[4] In meeting this argument, it is not necessary to take the position that habeas corpus should not be allowed in a situation where the military authorities attempt to reach out into the civilian population and assume authority over an individual who is not and never has been subject to military justice.[5] One can certainly imagine a hypothetical case where the action of the military authorities would appear so arbitrary and without sanction of law that the civil courts would conclude that to continue the imprisonment pending military review would be so unreasonable as to justify the immediate release of the prisoner. This was the type of situation contemplated by the court in *Henry* v. *Henkel*, 235 U.S. 219, in which the Court said, at page 230:

> The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute making an offense of the acts charged. In such case the committing court would have no jurisdic-

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[4] It was also alleged in the petition for a writ of habeas corpus (R. 3) that "in 1935 or 1936" petitioner "tendered himself to the civil authorities, namely the Sheriff of McClain County, Illinois, at Bloomington, Illinois, as a deserter" and that the Sheriff "received a response from the Federal authorities, namely, the Federal Bureau of Investigation or the United States Army, stating that [petitioner] was not wanted, whereupon [petitioner] was released" by the Sheriff. These allegations were denied in the return to the writ (R. 6) and no evidence was heard and no findings of fact made thereon by the District Court. Therefore, these facts cannot be regarded as established for the purposes of the present review.

[5] Cf. *Billings* v. *Truesdell*, 321 U.S. 542.

> tion, the prisoner would be in custody without warrant of law and therefore entitled to his discharge. *Greene* v. *Henkel*, 183 U.S. 249, 261. But the presumption is in favor of the validity of every act of Congress and it would not be proper for the committing magistrate to treat as invalid a statutory declaration of what should constitute an offense, except in those rare and extreme cases in which the act was plainly and palpably void.

Compare *Ohio* v. *Thomas*, 173 U.S. 276 (holding that the court would take jurisdiction of a habeas corpus proceeding to release a federal officer held for trial by a state); *In re Neagle*, 135 U.S. 1.

Here, on the other hand, stated in terms most favorable to the petitioner, a very real basis for asserting military jurisdiction exists, since the honorable discharge on which he relies relates specifically to his term of service from 1944 to 1946, and makes no specific reference to releasing him from service for any earlier period or terminating his liabilities for any prior derelictions. We shall argue in Point II of this brief that the action of the court-martial was entirely legal and proper; for the present, it suffices to point out that, whatever the ultimate disposition of the case on the merits, the assertion of jurisdiction by the court-martial does not appear to have been arbitrary or without color of law.

Since the action of the court-martial was not on its face arbitrary, petitioner's argument comes down to the proposition that because the issue he

raises is one which challenges the ultimate jurisdiction of the military authorities to hold and try him, he is now entitled to have that issue determined by the civil courts rather than await the final determination of the military courts.

If this argument is based on lack of jurisdiction as such, it is fallacious, since the ultimate ground for all habeas corpus proceedings is lack of jurisdiction in the persons depriving the petitioner of his liberty. See *Whelchel* v. *McDonald*, 340 U. S. 122, 126. Therefore, in every case where there is a sound basis for seeking habeas corpus there would be no room for requiring the exhaustion of appellate procedures. Petitioner's argument would eliminate in its entirety the principle of requiring that review procedures be completed.

To make sense of the petitioner's argument, it must be limited to jurisdiction *in personam;* that is, to situations where the petitioner is asserted not to be one of the class over which the imprisoning court has power. There seems to be no logical basis for arguing that lack of jurisdiction *in personam* should be considered a more fundamental error than lack of jurisdiction for any other reason. An unconstitutional statute used as a basis for depriving a man of his liberty would seem as serious a defect as lack of jurisdiction over the person. But it has been held that the issue of constitutionality does not justify the grant of habeas corpus prior to exhaustion of appellate procedures. *Henry* v.

Henkel, 235 U. S. 219; *Ex parte Royall*, 117 U. S. 241. Cf. *In re Lancaster*, 137 U. S. 393. Similarly, to deprive a man of his liberty under a misconstruction of a statute, so that in the end it will be found that he did not commit any crime at all, seems to be as serious an infringement of his constitutional rights. *Sunal* v. *Large*, 332 U. S. 174.

Assuming, however, that the issue is different when jurisdiction over the person of the petitioner is involved, that specific situation was met in *United States* v. *Sing Tuck*, 194 U. S. 161. In that case a group of Chinese were held by the immigration authorities when they attempted to enter the country. The petitioners asserted that they were citizens of the United States by birth, that the immigration authorities had power to restrain only aliens, and that therefore their detention was totally illegal. Mr. Justice Holmes delivered the opinion for the majority of the Court, stating at p. 168:

> We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for *habeas corpus* setting up want of jurisdiction, whether of an executive officer or of

> an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right. A familiar illustration is that of a person imprisoned upon criminal process by a state court under a state law alleged to be unconstitutional. If the law is unconstitutional the prisoner is wrongfully held. Yet except under exceptional circumstances the courts of the United States do not interfere by *habeas corpus*. The prisoner must in the first place take his case to the highest court of the State to which he can go, and after that he generally is left to the remedy by writ of error if he wishes to bring the case here. *Minnesota* v. *Brundage*, 180 U. S. 499; *Baker* v. *Grice*, 169 U. S. 284. * * *

We do not present these arguments as technical limitations on the district court's discretion to grant the writ. On the contrary, we recognize that it was the court's duty to issue the writ if awaiting the exhaustion of the military procedures would for any reason have deprived him of his liberty without providing adequate means for correcting the errors he alleges existed. If, for example, the review procedures would not have included an examination into the jurisdictional issue, there might be reason for resort to the civil courts. In this case, however, there can be no question but that the issue of the jurisdiction of the court-martial

may properly be considered on an application for a new trial under AW 53. See Manual for Courts-Martial, 1949, p. 108. Indeed, this would seem to be the kind of case where the civil courts might well prefer to await the prior action of the military authorities because of their presumed acquaintance with this type of question.[6]

Nor is this a situation where the petition for a new trial is largely a matter of form. Cf. *Levers* v. *Anderson*, 326 U.S. 219. The review procedures provided by AW 53 were very different from the regular appellate procedure under AW 50. In the regular appeals, the record was reviewed by a Board of Review, with a provision for additional consideration by The Judge Advocate General and by the Judicial Council under certain circumstances specified in AW 50 (*infra*, pp. 40-42).[7] In the procedure under AW 53,

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[6] Cf. *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, in which the same principles were applied to anticipation of administrative action.

[7] A case is transmitted to the Judicial Council for confirming action (1) when the Judge Advocate General or the Board of Review deems such action necessary, (2) when the Board of Review holds the record legally sufficient to support the findings of guilty and sentence but modification of the findings or sentence is deemed necessary to the end of justice by the Board of Review or the Judge Advocate General, and (3) when the Board of Review holds the record legally insufficient but the Judge Advocate General does not concur. AW 50(e). Under the provisions of Article of War 48 (c) and (d) (10 U.S.C., Supp. IV, 1519 (c), (d)), in addition to

the review is required to be made by The Judge Advocate General himself.[8] Moreover, the scope of review is different. The purpose of the original review applicable to this case was to determine whether the record of trial was legally sufficient to support the findings of guilty and the sentence (AW 50 (e)). Under AW 53, The Judge Advocate General is authorized to consider not only the record of trial but also any facts and information presented to him, whether included in the record or not.[9] Actually, in this case there is present not

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the approval required by Article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

(c) By the Judicial Council, with the concurrence of The Judge Advocate General, with respect to any sentence—

(1) when the confirming action of the Judicial Council is not unanimous, or when by direction of The Judge Advocate General his participation in the confirming action is required, or

(2) involving imprisonment for life, or

(3) involving the dismissal of an officer other than a general officer, or

(4) involving the dismissal or suspension of a cadet;

(d) By the Judicial Council with respect to any sentence in a case transmitted to the Judicial Council under the provisions of article 50 for confirming action.

In this case, under the provisions of AW 50 (e)(1), confirming action by the Judicial Council was not deemed necessary by The Judge Advocate General or the Board of Review. (See pp. 46-47, *infra*.)

[8] The Judge Advocate General's Office advises that the staff which assists The Judge Advocate General in applications under AW 53 is separate and distinct from officers working on review under AW 50 and that The Judge Advocate General has personally signed his actions and opinions in these cases (see Memorandum Opinions of The Judge Advocate General of the Army).

[9] See Manual for Courts-Martial (1949) pp. 108-110; Manual for Courts-Martial, United States (1951) p. 180.

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only the possibility of reversal on rehearing; there is, as pointed out above (*supra*, p. 6), the additional possibility that the Commanding General will commute the sentence of imprisonment when ordering the sentence executed.

Stripped of petitioner's eloquence, all that this case amounts to is that he has been tried for desertion, has defended himself on the ground that he was not subject to military discipline, and has been found subject to the jurisdiction of the military court and adjudged guilty of the offense charged. The issue presented in the habeas corpus proceeding was urged before the court-martial, was considered on review, and may be argued in the procedures provided by AW 53. It appears particularly inappropriate that, having submitted this issue to the military authorities, petitioner should now be entitled to resort to habeas corpus without exhausting the procedures which he has already sought to utilize. The reason the petitioner seeks such relief is not primarily because he believes that the federal civil courts are the appropriate forum, but because he has received a negative answer in his initial approaches to the military courts. In its most obvious form, this is an attempt to substitute habeas corpus for appellate review, and in that sense is to be distinguished from many of the cases cited by petitioner where the resort to habeas corpus was made at the very beginning of the proceeding. See, *e.g.*, *United States*

ex rel. Viscardi v. *MacDonald*, 265 Fed. 695 (E. D. N. Y.); *United States ex rel. Santantonio* v. *Warden*, 265 Fed. 787 (E. D. N. Y.); and *Ex Parte Wilson*, 33 F. 2d 214 (E. D. Va.).[10] In the corresponding situation with respect to extradition proceedings, this Court has noted, as one reason for denying the writ, that the petitioner waited until he had been surrendered to the state where he was tried before challenging the authority of the surrendering state. *Cook* v. *Hart*, 146 U. S. 183, 193.

Even the dissenting opinions of this Court which have taken the most generous position toward granting the writ in the absence of completion of appellate procedures, have fallen far short of the position urged by the petitioner in this case. Thus, in *Sunal* v. *Large*, 332 U.S. 174, Mr. Justice Rutledge, at 189, expressed his position as follows:

> The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available.

In the same case, Mr. Justice Frankfurter, dissenting at page 187, approved Judge Learned Hand's statement that the writ should be granted wherever it is necessary "to prevent a complete miscarriage of justice," citing 157 F. 2d 811, 813. No support is found in the opinions in this Court, either majority or dissenting, to uphold the use of

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[10] Petitioner's citation of *Hirshberg* v. *Cooke*, 336 U.S. 210, is inappropriate for there the court-martial proceedings had been completed.

habeas corpus when review processes are not only available but where it appears that such procedure is entirely appropriate to meet the alleged error in the trial court.

It is therefore urged that this particular case not only does not show exceptional circumstances justifying departure from the general rule requiring the exhaustion of the military procedures but that it is, on the contrary, an excellent example of a situation justifying the existence of the rule.

II

Petitioner's 1946 Honorable Discharge Related Only to the Period It Purported to Cover and Did Not Relieve Him from His Obligations under His Prior Enlistment Nor Preclude His Court-martial for Desertion Therefrom

Assuming that petitioner may at this time contest the jurisdiction of the court-martial by habeas corpus proceedings, the judgment of the court below, ordering dismissal of the petition and discharge of the writ, should be sustained on the ground that petitioner is validly detained in the custody of the Army.[11] It is respondents' position that petitioner's honorable discharge covered no more than on its face it purported to cover, i.e., pe-

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[11] Some modification of the judgment below would be necessary since, under the holding of the court below the dismissal would be without prejudice to the right to file a new petition for a writ of habeas corpus after the administrative remedies have been exhausted (R. 57). If the merits of the attacked jurisdiction are considered and sustained, there would be no reason for a dismissal without prejudice.

titioner's service from March 16, 1944, to June 29, 1946. The honorable discharge, therefore, did not condone petitioner's desertion in 1943 from his prior enlistment or preclude his trial by court-martial for such desertion.

A. *Petitioner's 1930 enlistment was still in effect at the time of his trial before the court-martial, unless the 1946 discharge acted as a release from it.*

Enlistment is a contract. It changes the status of the enlistee from civilian to military. No breach of the contract destroys the new status or relieves from the obligations imposed by the contract. *In re Grimley*, 137 U.S. 147; *In re Morrissey*, 137 U.S. 157, 159-160. Upon his enlistment petitioner "became entirely subject to the control of the United States in respect of all things pertaining to or affecting his service." *United States* v. *Williams*, 302 U.S. 46, 50. AW 107 (10 U.S.C. 1579, pp. 38-39) provides that a deserter, before being discharged from his enlistment, is liable to serve, after his return to a full duty status, the balance of his enlistment term remaining unserved at the time of his desertion.[12] A similar provision has

[12] Art. 107 [10 U.S.C. 1579]:

> Every soldier who in an existing or subsequent enlistment deserts the service of the United States * * * shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

been in the Articles of War since 1802. (Act of March 16, 1802, Sec. 18, 2 Stat. 136.) This liability to make good the time lost by desertion is independent of punishment for the desertion. This Court said, in the *Morrissey* case, *supra,* (137 U.S. at 159-160) that petitioner's "desertion and concealment for five years did not relieve him from his obligations as a soldier, or his liability to military control."

At the time petitioner deserted in 1943, he would have had more than two years of his 1930 three-year enlistment to serve [13] under AW 107, regardless of the Extension of Service Period Act.[14] Because of his desertions, his obligation to serve had not been discharged at the time of his apprehension in 1949. The time lost from this enlistment was not made up by the 1944-1946 military service since an enlistment by a soldier already subject to an existing enlistment "without having first received a regular discharge" is defined in AW 28 (10 U.S.C. 1499, Appendix A, *infra,* p. 38) as a desertion and the soldier is deemed to have en-

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[13] He served from March 12, 1930 to July 2, 1930, before deserting the first time, and from October 13, 1942 to March 15, 1943, before deserting the second time. See pp. 2-3, *supra.* He thus had served only approximately nine months of the three-year enlistment period.

[14] Under that Act his enlistment would have extended to six months after the termination of the war, *i.e.*, to January 25, 1948. Section 3 of the Joint Resolution of July 25, 1947 (61 Stat. 451) provided that in the interpretation of the said Act, July 25, 1947, was to be deemed the date of termination of the war.

listed "fraudulently." Davis in his *Military Law of the United States*, 3rd ed., p. 432, explains the history and purpose of this provision as follows:

> Although this requirement had formed a part of the English Articles of War for a number of years, it was not formally embodied in the Mutiny Act until 1783. It will be found as Article 3, Section 6, of the British Code of 1774, as Article 3, Section 5, of the American Articles of 1776, and as No. 22 of the Articles of 1806.
>
> * * * The object of the provision, as it originally appears in the British Code, apparently was to preclude the notion, that might otherwise have been entertained, that a soldier would be excused from repudiating or departing from his original contract of enlistment, provided he presently renewed his obligation in a different portion of the military force.

Moreover, the language of AW 107 that "[e]very soldier who in an existing or subsequent enlistment deserts * * * shall be liable to serve, after his return to a full duty status, for such period as shall, with the time he may have served prior to such desertion * * * amount to the full term of that part of his enlistment period" would preclude crediting the 1944-1946 service to the prior enlistment. And see Army Regulations 615-360, *infra*, note 15, p. 28.

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B. *The 1946 honorable discharge did not release petitioner from his 1930 enlistment nor relieve him of liability for violations occurring during that enlistment.*

Despite the obligations of petitioner under his earlier enlistment (*In re Morrissey*, 137 U.S. 157; AW 107), with its attendant subjection to court-martial jurisdiction (AW 2, 10 U.S.C. 1473), petitioner claims that his 1946 honorable discharge, which by its dates referred only to the 1944-1946 service and contained a serial number pertaining to that service only, and which was issued without knowledge of the prior desertion, discharged him from the prior enlistment and made him a civilian, no longer subject to court-martial jurisdiction.

The only statute dealing with discharges from the military service is AW 108 (10 U.S.C. 1580, Appendix A, *infra*, p. 39). *Nordmann* v. *Woodring*, 28 F. Supp. 573, 575 (W.D. Okla.); *Reid* v. *United States*, 161 Fed. 469, 471 (S.D. N.Y.), writ of error dismissed, 211 U.S. 529; cf. *Lamb* v. *Patterson*, 329 U.S. 539, 542. This article prohibits a discharge before expiration of "term of service" except by order of certain officers or by sentence of a general court-martial. It has been held that no discharge may be given a soldier except as authorized by AW 108. *Nordmann* v. *Woodring, supra; Reid* v. *United States, supra;* Winthrop, *Digest of Opinions of The Judge Advocate General, 1895*, page 21.

The combined effect of Articles 28, 107, and 108 accordingly prohibited the discharge of petitioner from the earlier enlistment from which he deserted, in the absence of a special order as provided in AW 108. Cf. *In re Markun*, 232 Fed. 1018 (E.D. Pa.) No such order authorized petitioner's discharge.[15]

The long-continued consistent administrative interpretation supports the conclusion that a discharge relates only to the period it purports to cover and does not release a deserter from liability for deserting in a prior unexpired enlistment. Thus, the 1928 Manual for Courts-Martial, United States Army, which was in effect until February 1, 1949, provided (p. 8):

> A discharge, other than dishonorable, releases only from the particular contract and term of enlistment to which it relates, and

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[15] Paragraph 44 of Army Regulations 615-360, dated May 25, 1944, covering discharges of enlisted men, pertinently provided as follows:

"When involving desertion from prior military service.—a. When an enlisted man who has enlisted or been inducted is in a status of desertion from prior service in the Army.

(1) If the statute of limitations is not applicable the enlisted man will be dropped from his current service and held to his first unterminated service and the appropriate commanding officer will dispose of the charges of desertion. See AR 615-300.

(2) If the statute of limitations is applicable, he will be discharged from the prior service from which he deserted, by reason of desertion and trial barred by 39th Article of War and he will be retained in his current service.

(3) When an enlisted man is dropped an appropriate entry will be made in the service record for the period of service from which dropped, showing why so dropped and to which period of service held, adding other desired data as to records and reports. See also AR 345-125."

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> therefore does not terminate other subsisting enlistments or relieve the soldier from liability to trial by court-martial for an offense committed during any of such enlistments.[16]

See also, Winthrop, *Dig. Op. JAG, 1895*, p. 360:

> *Held* that an honorable discharge was simply a termination of the particular enlistment which the soldier was then serving; that it was a discharge only from that enlistment, and did not apply to, or discharge from, other prior unexpired enlistments if any. * * * Unlike a dishonorable discharge, * * * an honorable discharge from one enlistment does not release the soldier from the consequences of a desertion committed under a prior enlistment.

Dig. Op. JAG, 1912, p. 462:

> XXII A. An honorable discharge releases from the particular contract and term of enlistment to which it relates, and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment.

Dig. Op. JAG, 1912-1940, p. 381:

> A member of the National Guard, District of Columbia, did not respond on August 5, 1917, to the draft under the President's

[16] The 1949 Manual for Courts-Martial, United States Army, contains the same language (p. 10), except that the words "or bad conduct" are added after the word "dishonorable."

> proclamation of June 3, 1917, and was dropped as a deserter. He was drafted into the Federal service on October 11, 1918. He has now been honorably discharged. The present status of the soldier is that of a deserter from the Army of the United States. His honorable discharge released him only from the term of enlistment which he entered into by reason of his draft on October 11, 1918. It did not release him from his obligations under the draft of July 3, 1917, which became effective as to him on August 5, 1917. 251.29, Jan. 25, 1919.

In CM 336336, *Case of Taylor* (not reported), the Board of Review, on May 13, 1949, held legally sufficient a conviction for desertion where the accused had received an honorable discharge from a subsequent enlistment.

This long-established interpretation is entitled to great weight. *Hiatt* v. *Brown*, 339 U.S. 103, 109; *Hirshberg* v. *Cooke*, 336 U.S. 210, 216. And see 28 Op. Atty. Gen. 83, 88, where the Attorney General said:

> I see no reason to believe that Congress had in mind any fixed definition of its own of an honorable discharge, * * * as distinguished from the notion of adopting the possibly varying practices of the two departments. In other words, I do not think that Congress intended to go behind any conceptions and practices of the War Department and the

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conceptions of American military men in the matter of an honorable discharge, or to go behind any such conceptions and practice in the Navy Department and service, even if that should differ from the practice of the War Department and army.

Petitioner relies principally upon *Ex parte Drainer,* 65 F. Supp. 410 (N. D. Calif.), affirmed *sub nom. Gould* v. *Drainer,* 158 F. 2d 981 (C.A. 9), involving a desertion from the Marine Corps which was held to be exonerated by a discharge from a subsequent enlistment. The Articles for the Government of the Navy, as distinguished from AW 107, did not make mandatory the serving of time lost in desertion,[17] nor did they prohibit a discharge prior to the end of the term of an enlistment, as is the case under AW 108. Accordingly, the *Drainer* decision is distinguishable.

It should be noted that Congress has now adopted for the entire military service the Army's interpretation of the effect of a discharge. Subdivision (c) of Article 3 of the new Uniform Code of Military Justice (64 Stat. 109; 50 U.S.C., Supp. IV, 553 (c)) provides that "Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this code by virtue of a separation from any subsequent

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[17] The Act of May 21, 1928 (45 Stat. 620, 34 U.S.C. 183a) provides that Navy deserters "may be permitted to serve" time lost.

period of service." This provision was prompted by *Ex parte Drainer*. House Report No. 491, 81st Cong., 1st sess., April 28, 1949, p. 12. Moreover, the *Drainer* decision ascribes undue weight to the remarks of this Court in the only decision cited as authority, *United States* v. *Kelly*, 15 Wall. 34. The *Kelly* case did not involve court-martial jurisdiction. It concerned a soldier who had deserted, who had then been restored to duty by the commander competent to bring him to trial for desertion and who had thereafter been honorably discharged. This Court held that, in a suit for bounty money, the United States could not go behind the discharge to show the desertion.[18] On the other hand, in *United States* v. *Landers*, 92 U.S. 77, where the desertion occurred after bounty money had accrued, and where the soldier's restoration to duty involved the forfeiture of all pay and allowances due or to become due, he was held not entitled to bounty, notwithstanding that his restoration to duty was followed by an honorable discharge. Obviously the characterization of *Kelly's* discharge as a final judgment of the Government does not support the view that such a discharge affects a desertion under an earlier,

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[18] Since the circumstances under which *Kelly* was restored to duty amounted to a condonation of his offense (Winthrop, *Military Law and Precedents* *406; Manual for Courts-Martial (1949), Par. 69*b*), the same result would have followed if the Government had been permitted to go behind the discharge.

separate, and uncompleted enlistment.[19] See *United States* v. *Sweet*, 189 U.S. 471.

Hirshberg v. *Cooke*, 336 U.S. 210, and the other cases on which petitioner relies are all inapplicable since they all involve only the effect of an honorable discharge on offenses committed during the particular enlistment to which the discharge related. They do not raise the question here involved, i.e. whether an honorable discharge goes back beyond the term to which it purports to relate so as to have the effect of condoning a desertion during a term of enlistment for which there is on the record no discharge.[20]

The rule which petitioner wishes the courts now to adopt is an extremely artificial and illogical one. It would permit a wartime deserter, who has committed a heinous offense[21] which is subject to

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[19] In the case entitled *In the Matter of the Application of Robert A. Hamilton for a Writ of Habeas Corpus*, No. 30134 (N.D. Calif., So. Div.), petitioner had received an honorable discharge before expiration of his term of enlistment in order to reenlist for three years. There was no *hiatus* in his service. He contended that the honorable discharge barred trial by court-martial for a larceny committed prior to the date of the discharge. Judge Roche, who authored the *Drainer* opinion, held on January 22, 1951, that "the honorable discharge certificate dated February 15, 1950, delivered to petitioner, was not a formal final judgment upon the petitioner's service in the Armed Forces of the United States, and such discharge did not operate to divest the General Court-Martial aforesaid of jurisdiction to try him for the offense charged."

[20] For this reason, petitioner's assertion that this case involves the status of discharged veterans generally is unsound. The only persons affected are those in the same status as petitioner, who deserted and failed to reveal their prior enlistment on induction into the Army.

[21] The seriousness with which Congress regards desertion is indicated by the fact that a court-martial conviction resulting

no statute of limitations (AW 39, 10 U.S.C., Supp. IV, 1510), to escape prosecution by committing another wrongful act, fraudulently enlisting without revealing his prior enlistment. Such a ruling would be particularly unrealistic in the light of the practical situation confronting the Army after the termination of hostilities in World War II. This Court is undoubtedly aware of the public clamor after the cessation of hostilities for the return of servicemen from overseas and for their discharge. During the fiscal year 1946 over 7,500,000 persons were separated from the Army. Annual Report of the Secretary of the Army 1948, Tables 20-22. These persons were separated before their terms of service were completed. See Extension of Service Act, *supra*. Authority to order their discharge was granted to separation center commanders by paragraph 13*a* of War Department Circular 188, dated June 23, 1945 (See AW 108). At the time of petitioner's discharge there were 21 separation centers in the United States. (Change No. 1 to Appendix 1, War Department Readjustment Regulations 1-2, January 31, 1946). Much of the processing for separation of overseas troops was completed before their return to the states (see par. 4, RR 1-1, March 18, 1946). Section IV of Circular 188, *supra*, directed that "Processing at separa-

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in a dishonorable discharge is ground for loss of citizenship. 8 U.S.C. 801(g); see *Roberts* v. *United States District Court*, 339 U.S. 844.

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tion centers will normally be scheduled to effect release of personnel received within 48 hours after arrival."

The only effective method of discovering deserters is by means of fingerprints. With millions of persons involved, names mean little in the military service. Serial numbers are the prime means of identification. Deserters naturally disclaim prior service at induction, and receive new serial numbers, as petitioner did. To have compared the fingerprints of persons prior to separation with those of known deserters would have been a colossal task and would have seriously hampered the demobilization. To hold under these circumstances that petitioner's discharge is entitled to the effect he urges would obviously be in disregard of the realities of the situation. If the "formal final judgment" language of *United States* v. *Kelly, supra,* decided by this Court in the December, 1872 Term, and relied upon by the Court in the *Drainer* case, ever was applicable to matters concerning court-martial jurisdiction, and we contend it never was, it manifestly should not be held to be applicable under conditions prevalent in this period. Nor can it be said that there existed a duty at any time on the part of the Army to have the names and fingerprints of the millions of inductees compared with those of known deserters. In this respect it should be noted that petitioner's contention is that his honorable discharge, not his subsequent military serv-

ice, terminated military jurisdiction and in effect pardoned the desertion.[22]

Not only would the sustaining of petitioner's contention ignore realities, but it would be a contradiction of the rule that enlistment is a contract with its concomitant obligations.[23] *In re Grimley, supra; In re Morrissey, supra.* It would thwart the clear intent of Congress that soldiers should not be permitted to evade their enlistment obligations by deserting (Articles 28, 107 and 108) and that wartime deserters should not escape serious punishment (Article 39; 8 U.S.C. 801(g)). It is submitted that petitioner's 1946 discharge for the period from 1944 to 1946 did not deprive the general court-martial of jurisdiction to try him for his 1943 desertion.

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[22] See 31 Op. Atty. Gen. 419 (1919) in which the Attorney General, in an exhaustive opinion, reached the conclusion that a pardon by implication or construction is a thing not known to or recognized by the law and that a pardon is an express act based upon an intent directed to the particular offense and the reasons excusing it with a will to wipe out the punishment therefor. In the present case petitioner does not claim that the military authorities had knowledge of the offense at the time he received his discharge certificate.

[23] See 59 Harv. L. R. 1156, 1157 (1946) which comments that:

> * * * As a matter of statutory interpretation, since a discharge purports to relate only to the enlistment for which it is given, it seems unrealistic to hold that it must be a termination of liability resulting from prior service.

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CONCLUSION

We respectfully submit that the judgment of the court below should be affirmed.

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SEPTEMBER, 1951.

APPENDIX A

The pertinent provisions of the Articles of War, Act of June 4, 1920, chapter 227, subchapter II, 41 Stat. 787, are as follows:

Art. 28 [10 U.S.C. 1499]:

> Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

Art. 58 [10 U.S.C. 1530]:

> Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

Art. 107 [10 U.S.C. 1579]:

> Every soldier who in an existing or subsequent enlistment deserts the service of the United States * * * shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform

duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

Art. 108 [10 U.S.C. 1580]:

No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

The pertinent provisions of the Articles of War, as amended by the Act of June 24, 1948, c. 625, title II, 62 Stat. 634, 635, 638, 639, are as follows:

Art. 47 [10 U.S.C., Supp. IV, 1518] Action by convening authority—* * *

* * * * *

(c) Action on record of trial.

Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The

Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

(d) Approval.

No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: * * *

* * * * *

Art. 50 [10 U.S.C., Supp. IV, 1521] Appellate review—* * *

* * * * *

(e) Action by Board of Review in cases involving dishonorable or bad-conduct discharges or confinement in penitentiary.

No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by gen-

eral court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening

authority for rehearing or such other action as may be appropriate.

(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

* * * * *

(g) Weighing evidence.

In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

* * * * *

Art. 51 [10 U.S.C., Supp. IV, 1523] Mitigation, remission, and suspension of sentences —(a) At the time ordered executed.

The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended. * * *

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Art. 53 [10 U.S.C., Supp. IV, 1525] Petition for new trial.

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate Gen-

> eral or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

Section 2[24] of the Act of December 13, 1941, c. 571, 55 Stat. 799, 800, 50 U.S.C. App. 732 (Extension of Service Act), provided:

> The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section [during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war]: *Provided*, That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case.

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[24] The Joint Resolution of July 25, 1947, c. 327, Sec. 3, 61 Stat. 451 (see 50 U.S.C. App., Supp. IV, 732), provided that in the interpretation of this section relating to the extension of periods of service, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress.

APPENDIX B

The following documents are of record in the official file, No. 339567, of The Judge Advocate General's Office:

HEADQUARTERS FIFTH ARMY

Chicago 15, Illinois

7 December, 1949.

In the foregoing case of Recruit William H. Giese, RA 6 758 678, 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois, the sentence is approved, but the period of confinement is reduced to ten months and the dishonorable discharge is mitigated to a bad conduct discharge.

The Post Guardhouse, Fort Sheridan, Illinois, is designated as the place of confinement.

Pursuant to Article of War 50e, the order directing the execution of the sentence is withheld.

[Signed] S. J. CHAMBERLIN,
S. J. CHAMBERLIN,
Lieutenant General, U. S. Army,
Commanding.

DEPARTMENT OF THE ARMY

Office of The Judge Advocate General,
Washington 25, D. C.
Board of Review

CM 339657 30 October 1950.

UNITED STATES

v.

RECRUIT WILLIAM H. GIESE (RA 6758678), 5012 Area Service Unit, Station Complement, Head-

quarters Company, Detachment #3, Fort Sheridan, Illinois.

Fifth Army

Trial by G.C.M., convened at Chicago, Illinois, 16 and 30 June and 7 July 1949. Bad conduct discharge, total forfeitures after promulgation and confinement for ten (10) months. Post Guardhouse.

HOLDING BY THE BOARD OF REVIEW

GUIMOND, BISANT AND OEDING

Officers of the Judge Adocate General's Corps

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

[Signed] J. A. GUIMOND, J.A.G.C.
[Signed] OSCAR M. BISANT, J.A.G.C.
[Signed] ERNST C. OEDING, J.A.G.C.

1st Indorsement

October 31, 1950.

Dept. of Army J.A.G.C.

To the Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Recruit William H. Giese (RA 6758678), 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the

findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

[CM 339657].

For the Judge Advocate General;
[Signed] W. P. CONNALLY, JR.,
WILLIAM P. CONNALLY, JR.,
Colonel, JAGC,
Assistant Judge Advocate General.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 968704 193